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Supreme Court, U.S.
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No. 97-682

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MARGARITA SERAPION,

Petitioner,

v.

MARTINEZ ODELL & CALABRI. *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Martínez Odell & Calabria, Fred H. Martínez, and the conjugal partnership composed of Fred H. Martínez and Josefina Guzmán; Lawrence Odell, and the conjugal partnership composed of Lawrence Odell and Margaret Mejía; José Luis Calabria, and the conjugal partnership composed of José Luis Calabria and Nereida Seda, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the First Circuit Court of Appeals' opinion in this case. The opinion is reported at 119 F.3d 982 (1st Cir. 1997).

Review by this Court is unwarranted, as the First Circuit correctly applied federal law in determining that Petitioner is not an employee covered by Title VII of the Civil Rights Act,

there is no substantial conflit between the Circuits, and Petitioner relies on unsubstantiated argument and representations of Puerto Rico law.

STATEMENT OF THE CASE

Introduction

The statement of the case presented by Petitioner in this Writ of Certiorari is essentially an argument which misstates both background[1] and material facts. Most importantly, Petitioner engages in erroneous legal argument. As detailed below, there is no basis for this Court's review of this factbound contention. Both the district court and the First Circuit Court of Appeals based their determination on the threshold issue of coverage upon considered analyses of the undisputed material facts.

The Petitioner misrepresents the facts in this case

Having failed to survive summary judgment because the totality of the circumstances of Petitioner's relationship with Martínez Odell Calabria & Sierra (the Firm)[2] demonstrates that she had the indicia of ownership and authority typical of proprietary partners, Petitioner now urges this Court to adopt an "entity approach" allegedly because the nature of the Firm

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[1] Petitioner embellishes when she claims that she was a full-time professor of accounting and taxes in the school of Business Administration of the University of Puerto Rico, which implies tenure. Petitioner was simply a full time instructor in those areas. Similarly, she takes full credit for the authorship of a book published for many years by her partner and mentor, Mr. Ralph Sierra Jr., who included her as co-author of the book in 1990. She is still a co-author.

[2] Petitioner did not name her alleged employer, Martínez Odell Calabria & Sierra as defendant in this case. Rather, she chose to sue the new firm created by her former partners Martínez, Odell and Calabria after the dissolution of the Firm.

under the Laws of the Commonwealth of Puerto Rico mandates the inclusion of all partners in the definition of employee under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 3000e.

Petitioner misrepresents the facts in contending that all attorneys in the firm received salaries "*...as employees, pursuant to the laws of the Commonwealth of Puerto Rico.*" That is bare argument, unsupported by the uncontroverted facts of this case, or by adequate reference to Puerto Rico law. Similarly, Petitioner's assertion that the "*sociedad*", meaning the law partnership, makes contributions to the Puerto Rico Workmen Accident Compensation Insurance Corp. and other unemployment systems on behalf of the partners, implying that such contributions are made on behalf of the proprietary partners, is a misstatement of fact totally unsupported by the footnote to the statement. Most importantly, that "fact" was not raised by Petitioner in her opposition to summary judgment. Petitioner's statement of contested material facts before the district court failed to include any evidence with respect to the facts that would support her contention that professional partnerships under the Civil Code of Puerto Rico are *de facto* professional corporations which treat all partners as employees.

THE WRIT SHOULD BE DENIED AS UNWARRANTED

I. THE FINDINGS OF THE GLASS CEILING COMMISSION AND/OR THE STATISTICS ON WOMEN AND MINORITY PARTICIPATION IN THE HIGHER ECHELONS OF THE PROFESSIONAL WORLD FAILED TO JUSTIFY BROADENING THE REMEDIAL GOALS OF TITLE VII

Petitioner's argument that the First Circuit Court of Appeals erred in ignoring the structure of the employing entity and refusing to extend coverage to Petitioner is premised on two fallacies; that a *per se* rule would be in harmony with the purposes of the Act, and that Puerto Rico partnerships are *de facto* professional corporations which requires coverage under the Act for all Firm members, regardless of partnership indicia.

Contrary to Petitioner's contention, the status of the market place for women and minorities referred to in studies as the "Glass Ceiling" does not render the issue herein one of extraordinary public importance which warrants review by this Court. As noted by this Court, the Constitution protects *persons,* not *groups*. *Adarand v. Peña*, 515 U.S.__, 132 L.Ed.2d 158, 115 S.Ct. 2097 (1995). The mere fact that Petitioner is a member of a protected group does not warrant review, particularly in the absence of evidence of prejudicial error by the Court below. Petitioner's reliance on a *per se* entity test to stretch the coverage of Title VII to her benefit is contrary to the fair application of federal law. As aptly stated by the Tenth Circuit in *Wheeler v. Hurdman*, 825 F.2 257, 275, 276 10th Cir. (1987);

> To suggest that Congress intended the provisions of Title VII, the ADEA, and the FLSA to reach all

> situations where discrimination may arise in a business setting is to suggest that it enacted these statutes with the intent that they cover all individuals having an economic relationship with a business. This would make employee status largely irrelevant and would essentially transform the employment discrimination statutes into *business* discrimination statutes. *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983). If this were the case, then we must question why Congress bothered to limit each statute's reach to employment practices. The requirement that the statutes cover only employment situations suggests that Congress perceived a need to limit the application of these statutes. *Id.*; *see* also *Hishon v. King & Spaulding*, 467 U.S. 69, 79, 104 S.Ct. 2229, 2235, 81 L.Ed.2d 59 (1984) (Powell, J., concurring).

Accordingly, the First Circuit Court of Appeals did not err in considering all the factual circumstances of Petitioner's relationship with the Firm to determine that Petitioner was not an employee covered by Title VII.

II. THE DETERMINATION OF COVERAGE UNDER TITLE VII IS AN ISSUE OF FEDERAL LAW WHICH DOES NOT PERMIT A MECHANICAL PER SE "ENTITY APPROACH"

While the different circuits have reached various results in analyzing coverage under the antidiscrimination statute, they all travel the same road of considering federal statutes, legislated history, judicial decisions and common understandings. Precisely, the court whose decisions Petitioner relies on in seeking this Court's review, the Second Circuit, has emphatically stated that no *per se* rule applies.

> Like life, the law is not that simple. In fact, decisional law makes plain that no *per se* rule has been adopted that includes all those working for a corporation as employees—regardless of the amount of their stock ownership, their lack of involvement in the day-to-day activities of the business, or their failure to perform additional employee duties. *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 800 (2nd Cir. 1986)

For instance, in *E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2nd Cir. 1996), while the Court relied heavily on the fact that Johnson & Higgins chose to become a corporation over a partnership, and had operated as such for nearly 100 years, it did not make a determination of employee status solely on that ground. The Court considered the operations of this worldwide organization which employed over 8,000 people at the time of the opinion. *Id.*, at 1532, 1533.

The Court, in rejecting *Johnson & Higgins's* arguments of *de facto* partnership, following *Hyland, supra,* cautioned that while the roles of directors, as in a professional corporation, and partners are mutually exclusive, that does not mean that those who own shares in a corporation may or may not be employees. The *Hyland* court did not imply, much less hold, that all directors must be viewed as employees. "Directors who do not possess the common law indicia of employment are clearly not 'employees'." *Id.*, at 1538. Thus, the Court in both *Hyland* and *Johnson & Higgings* looked to the person's role in the company to determine whether there existed an employment relationship in addition to the role of director.

In *Hyland*, the court noted that the statute of Dr. Hyland was clear, as he was specifically designated as an employee of the corporation in an employment agreement containing detailed provisions relating to the terms and conditions of his employment. *Hyland,* 794 F.2d, at 798.

Under the *E.E.O.C. v. Johnson & Higgings* rationale, which Petitioner avers as furthering her cause, Petitioner would have no redress. Precisely, the Second Circuit barred allegations of *de facto* interpretations of a juridical figure chosen by contract. Like defendant in *Johnson & Higgings,* Petitioner in the present writ suggests a *de facto* interpretation of the structure of the Firm to liken it to a professional corporation. This interpretation is contrary to the holding of *Johnson & Higgings*, and, as will be further discussed below, is erroneous as a matter of law. *Johnson & Higgings* does not stand for a *per se* coverage rule for directors in a corporation.

Even within this framework of a professional corporation, the Second Circuit addressed the common law agency test of employment and effected a broad examination of the totality of the circumstances in a three-pronged test: (1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy. *E.E.O.C. v. Johnson & Higgings, Inc.*, 91 F.3d, at 1539.

The Court noted particularly that, even though the Board itself was the highest authority within J & H, the individual directors, in their capacities as officers and managers, each reported to the senior members of the Board, who are responsible for their annual performance evaluations. *Id.*, at 1539, 1540. It is significant that, at no time in the long and tortuous road of this case, has the Petitioner attempted to establish that she was evaluated by anyone, most particularly

the Executive Committee or the Board of Partners, after she became a proprietary partner in January, 1990.

The Third Circuit has acknowledged that the determination of whether the Federal Antidiscrimination Laws (ADEA) protects a director of a professional corporation hinges upon the director's duties and not the title. *Sempier v. Johnson & Higgings,* 45 F.3d 724, 728 n. 4 (3d Cir.), *cert. denied,* __ U.S. __, 115 S.Ct. 2611, 132 L.Ed.2d 854 (1995).[3]

There is no split among the circuits, or inconsistency with the decisions of other circuits or those of the first circuit warranting review

None of the Circuit Courts which have reviewed the issue of employee status under Title VII of the Civil Rights Act, or the Age Discrimination in Employment Act (ADEA); the First, Second, Third, Sixth, Seventh, Eighth, Tenth and Eleventh have adopted an entity rule as proposed by Petitioner. Even the Second Circuit, which has found the choice of the corporate figure significant, has considered and analyzed the specific factual circumstances of each case to determine whether the person whose status is in issue is an employee covered by the Federal Antidiscrimination Laws.

The Sixth, Seventh, Eighth, Tenth and Eleventh Circuit Courts of Appeals have also followed a factual analysis of employee indicia in determining whether salaried officers of a partnership were employees or not. *Simpson v. Ernst &*

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[3] In an earlier case quoted by Petitioner, *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.,* 670 F.Supp. 597 (W.D. Pa. 1987), the Court simply pointed out that the fundamental structural difference between a corporation and a partnership would seem to undermine the assertion that Petitioner enjoyed the rights and prerogatives of partnership. Its determination of employee status was premised by an in depth analysis of the operations of the professional corporation.

Young, 100 F.3d 436 (6th Cir. 1996), *cert. denied,* __ U.S. __ 117 S.Ct. 1862, 137 L.Ed.2d 1062 (1997); *E.E.O.C. v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068 (6th Cir. 1982); *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977); *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996), *cert. denied,* __ U.S. __, 117 S.Ct. 1694, 137 L.Ed.2d 821 (1997); *Wheeler v. Hurdman*, 826 F.2d 257 (10th Cir. 1987) and *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398 (11th Cir. 1991).

In *Wheeler*, the Tenth Circuit found individual partners of the partnership to be exempted, and therefore not taken into consideration for computation of the fifteen-employee minimum required for Title VII coverage. The court *quoted Burke v. Friedman, supra,* with approval stating:

> Partners manage and control the business and share in the profits and losses. *See Commissioner of Internal Revenue v. Tower*, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670 (1946); *Wilson v. Commissioner of Internal Revenue,* 161 F.2d 661, 664 (7th Cir. 1947). In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business. *Wheeler v. Hurdman*, 826 F.2d, at 264.

In *Wheeler*, the Court applied the economic realities test to determine employee status, and found, based upon the specific factors of the work relationship, that a general partner in an accounting firm was not an employee entitled to sue under Title VII. The Court rejected the arguments of the E.E.O.C and Ms. Wheeler to the effect that all partners must be covered under the Discrimination Acts, finding said construction contrary to congressional intent. *Id.*, at 275-276.

In conclusion, none of the circuits which have considered the status of directors or partners for purposes of federal antidiscrimination law, has established a *per se* rule to include persons or exclude them from coverage. All of the circuits delve into the facts of the case to determine coverage, and the First Circuit's decision in the present case correctly or properly summarizes the material factual analysis of employee criteria. In the absence of conflict between the circuits, certiorari is not warranted.

III. NOTHING IN THE PUERTO RICO PARTNERSHIP LAWS REQUIRES THE TREATMENT OF PROPRIETARY PARTNERS AS EMPLOYEES OF THE PARTNERSHIP

Petitioner initially argued to the district court that under Puerto Rico law,[4] the concepts of partner and employee are not mutually exclusive, and therefore, a *per se* rule excluding "partners" from the protection of Title VII would have no basis in the structure of the entity under the law of Puerto Rico, and that the specific facts of the relationship with the Firm indicated she was an employee rather than a proprietary partner exempt from coverage under Title VII. Having failed to thwart summary judgment on the specific facts and circumstances of her status as a proprietary partner, Petitioner proceeded to coin a new *per se* rule which she argued before the First Circuit Court, and now before this Court: that Puerto Rico Laws require the treatment of all partners, including proprietary partners, as employees for all purposes, including the interpretation of the Federal Antidiscrimination Acts.

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[4] Petitioner's reference to the Laws of Puerto Rico is generic, failing to address the specific statutes which regulate partnerships as an artificial person.

Nothing in the provisions of the Puerto Rico Civil Code and juridical opinions interpreting the partnership concept in the context of liability toward creditors or even for tax purposes, requires that proprietary partners be treated as employees. Articles 1556-1597, Puerto Rico Civil Code 1930, (Puerto Rico Laws Ann. tit. 31, §§ 4311-4399) In fact, the word "employee" is not used once in the statutes. On the other hand, the labor laws of the Commonwealth of Puerto Rico consistently follow the statutory exclusions originally stated in the Fair Labor Standards Act and exclude among others, independent contractors and executives from their coverage.[5]

A. The Partnership laws of Puerto Rico limn the duties and responsibilities of partners toward each other and to third parties, and not their status for labor or constitutional law purposes.

While undisputedly, professional partnerships have an independent juridical personality separate and apart from that of their proprietary partners under the Civil Code, they may not be likened to corporations. The partners, unlike stockholders in a corporation, do not enjoy limited responsibility, and they are liable with their own assets where the partnership's assets are insufficient to cover the liabilities of the partnership. *Asociación de Propietarios v. Santa Bárbara Co.*, 12 P.R.Dec. 43 (1982), *Rasa Engineering Corp. v. Daubón*, 86 P.R.R. 182 (1962).

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[5] The Fair Labor Standards Act, provides in pertinent part, as follows:

> ...(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman... 29 U.S.C. §213.

The Civil Code of Puerto Rico defines a partnership as "a contract by which two or more persons bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among themselves." Article 1556 of the Puerto Rico Civil Code, (Puerto Rico Laws Ann. tit. 31, § 4311) This definition is substantially the same as that set forth in the Uniform Partnership Act. Section 6 of this Act, provides that absent agreement as to the form of management, the following rules apply:

> (1) All the partners shall be considered agents, and whatever any one of them may do by himself shall bind the partnership; but each one may oppose the act of the others before they may have produced any legal effect.

Both the Uniform Partnership Act and the Civil Code have similar definitions for the distribution of profits and losses. The Code states: "All partners must share in the partnership's profits and losses in the proportion agreed upon and any agreement excluding a partner from any share in the profits or losses is legally void." (Articles 1580 and 1582 of the Puerto Rico Civil Code, (Puerto Rico Laws Ann. tit. 31, §§ 4351, 4353 (1993).) The Act sets forth at Section 9:

> Every partner is an agent of the partnership for the purpose of its business, and the act of every partner including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Article 1591 of the Puerto Rico Civil Code, (Puerto Rico Laws Ann. tit. 31, § 4391), provides that the partnership may be dissolved by the natural death, civil interdiction, or insolvency of any of the partners, and in the case prescribed in section 4373, by the will of any of the partners, subject to the provisions of sections 4396 and 4398. As a general rule, the death of a partner is cause for the dissolution of the partnership, except where there is express agreement to the contrary. See Article 1595 of the Puerto Rico Civil Code, (Puerto Rico Laws Ann. tit. 31, § 4395 (1993)).

In *Asociación de Propietarios v. Santa Bárbara Co., supra,* at 58, the Supreme Court of Puerto Rico, interpreting Article 1589 of the Civil Code, (Puerto Rico Laws Ann. tit. 31, § 4372), specifically held that partners in a professional partnership organized under the Civil Code answer subsidiarily and jointly with their personal assets for all responsibilities of the partnership, when the patrimony of the partnership is not sufficient. Petitioner erroneously argues that this is "limited" liability, because the partners respond "only" if the partnership does not have enough assets. The fact remains, however, that partners in Puerto Rico remain personally responsible for Firm's liability. Thus, the existence of a partnership does not exempt the partners from liability in their personal capacities. In reaching this conclusion, the Supreme Court of Puerto Rico adopted the theory that the legal entity born as a result of a partnership contract is not totally independent from the partners who constitute it, citing with approval the Spanish Civil Law commentator Manresa:

> A validly executed partnership contract produces, as a first effect, the creation of an artificial entity distinct and independent from that of each one of the partners that may deal with laws actively and passively, but the birth of said entity does not extinguish the personality

> of the partners or the legal nexus originating in their contractual relations, either with the partnership formed by them or with third persons alien to it. 11 Manresa, *Código Civil Español*, 442 (1972). *Id.*, at 58.

Furthermore, the Supreme Court of Puerto Rico has emphasized that public policy bars professionals subject to state licensing from avoiding personal liability by adopting a corporate form. *Asociación de Propietarios*, at 58-59.

In attempting to distance the Puerto Rico partnerships from their counterparts in the rest of the United States, Petitioner insists on the early common law definition of partnerships. The fact is that, as recognized in *Wheeler*, for many purposes, evolving law now classifies partnerships in the United States as separate entities rather than as an aggregate of partners; thus, partners, depending on their individual characteristics, may be classified as employees of any partnership entity. *Wheeler,* 825 F.2d, at 268.

The similarity between the Uniform Partnership Act and the Puerto Rico Partnership Laws is remarkable up to and including the evolving theory of partnerships under the common law, the entity v. the aggregate theory. (Zolman Cavitch, *Business Organizations*, Mathew Bender, §11.02[2], (Supp. 1996))

In fact, this is exactly the same dichotomy expressed by the Supreme Court of Puerto Rico in analyzing the dual role of partnerships as juridical entities, and the personal responsibility of the individual partners. *Buscaglia v. Tribunal de Contribuciones*, 65 D.P.R. 241 (1945); *Asociación de Propietarios, supra.*

Both in the Uniform Partnership Act and the interpretations by the Supreme Court of Puerto Rico of the Civil Code provisions regulating partnerships, the resulting

figure is a compromise. The partnership is an association of two or more persons to carry on a business for profit, and while the entity is recognized as separate for such purposes as to hold real property, sue and be sued, it is not totally separate and distinct from its members. (Zolman Cavitch, op. cit., at § 11.02[2].)

Moreover, Petitioner's reliance on the Second Circuit cases finding significant the choice of firm organization, is likewise misplaced. Just as in *Hyland* and *E.E.O.C. v. Johnson & Higgings*, defendants argued that the professional corporations were *de facto* partnerships, to bar coverage to plaintiffs, in the present case, Petitioner argues for a finding of a *de facto* corporation to obtain the coveted protection.

The fact is that, until recently, attorneys and other professionals were barred from adopting any type of business organization other than a partnership established under the Civil Code, most particularly, those based on the limited liability of its proprietors. In other words, attorneys had no choice, if they wanted to practice in a group, but to operate under a partnership. The juridical figure of the professional corporation was not available in Puerto Rico until the enactment of the General Corporation Law, No. 144 of August 10, 1995 and the Limited Liability Partnership authorized by Act 154 of August 20, 1996, both significantly after the dissolution of the Firm in April 1992.

Chapter XIII of the General Corporation Law of 1995 provides for the incorporation of a person or group of individuals for the purpose of practicing those professions requiring a professional license or other legal authorization which, before the enactment of the law, could not be provided by a corporation. In a professional services corporation, like in a regular corporation, a stockholder generally is not personally liable for the corporation's debts, liabilities or

other obligations. That is a far cry from the personal liability of the partners under the Civil Code, who respond with their personal assets beyond the assets of the partnership.

All provisions for the operation of a domestic corporation in the General Corporation Law of Puerto Rico were made applicable to a professional services corporation, except those which are in conflict with the provisions contained in Chapter XVIII (Professional Corporations). As to the management of the professional services corporation under Puerto Rico Law, stockholders are in an identical situation to those in the federal cases cited. They are not necessarily in control of its operations except in such cases where they are also directors or officers.

The enactment of Act 154 of August 20, 1996 by the Puerto Rico Legislature, overcame the limitation imposed by the Supreme Court in the previously discussed *Asociación de Propietarios, supra,* by allowing the establishment of partnerships, specifically professional partnerships, in which as a general rule each partner's personal assets are shielded from the partnership's liabilities. (See art. 8) These new laws are discussed only for comparison purposes, inasmuch as neither law is applicable to the firm which was dissolved on April 30, 1992, and is still in the process of liquidation.[6]

To summarize, nothing in the partnership law requires that a proprietary partner be treated as an employee. Partnerships are defined by the commitment of the partners to bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among

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[6] Petitioner contends that the liquidation process has been completed. She failed, however, to present any evidence to support said contention which remains merely unsubstantiated argument.

themselves. How they are compensated is, without more, insufficient to support a finding of employee status.

Moreover, where, as here, the proprietary partners received the profits of the firm in term of bonuses calculated by assigned unit distributions on a regular basis, all the proprietary partners of the firm, including Petitioner, were, and are, responsible under Puerto Rico Law for the liabilities of the firm, beyond the capitalization by partners. Clearly, nothing in the law and cases discussed above indicates any requirement by Puerto Rico Law that proprietary partners be treated as employees.

B. The determinations of the Supreme Court of Puerto Rico as to tax assessments against partnerships are immaterial to a determination of the labor status of a proprietary partner.

Petitioner insists on the applicability of tax laws as a source of regulation of partner's relations among themselves. *Buscaglia, supra,* at 340, cited by Petitioner in support of her contention that partners must be treated as employees of their law firms, is simply an analysis of the applicability of Puerto Rico Tax Law to partnerships.

While the Supreme Court of Puerto Rico initially determined that under the income tax law a professional partnership integrated by attorneys had to pay taxes on the profits of the partnership separate from the taxes to be paid by the proprietary partners on the profits distributed to them by the partnership for services rendered, (*Buscaglia v. Tribunal de Contribuciones,* 65 P.R.R. 9 (1945)), the Court reconsidered the double taxation issue raised by the taxpayers in *Buscaglia I, supra*, and noted that section 32(a)(1) of the income tax law establishes that in computing the net income of the corporation or society subject to assessment by section

28, the taxpayer shall be permitted the deduction of a reasonable amount for salaries or other compensation for personal services actually rendered by its members. *Buscaglia, supra,* at 341. The term "services rendered" does not necessarily refer to services rendered as an employee, but rather, would include professional services rendered by any person, regardless of whether the services in question were rendered by an independent contractor, a proprietary partner, or an employee without capital interest in the partnership.

The Supreme Court of Puerto Rico has expressly rejected Petitioner's position that *Buscaglia* and its progeny establish the status of law firm partners for all purposes. The Treasury Department was merely interested in collecting the taxes to be assessed pursuant to the laws of the Commonwealth, including those over the "salaries" assigned by law firm partners to themselves. In *Descartes, Treas. v. Tax Court; Dávila, Int.*, 79 P.R.R. 818, 827 (1957), the Supreme Court stated:

> It is not a function of the tax law to lay down legal rules for determining the validity of the entities which it subjects to taxation; that is a function of civil, mercantile, or corporation law. But the tax law does recognize and classify pursuant to its own rules, in the practical sphere in which it evolves, the existence of those entities as taxable creatures.
>
> Independently of the requirements or limitations that the civil or mercantile law might impose on an association of two or more persons in order that it may attain the juridical personality of a partnership (sociedad) or company, the tax law, in its function of realities, furnishes the necessary solution by attacking the problem with objective criteria: whether or not it is an entity whose legal existence conforms to the formalities of the civil or mercantile law, the special

statute imposes on it the burden of its tax liability in conformity with its own classification.

The Court in *Descartes* makes it absolutely clear that the tax laws of the jurisdiction are intended to exact revenues from different persons, including partnerships, but it applies revenue rules for tax purposes only.

C. The Labor Laws Of Puerto Rico Specifically Exempt Proprietary Partners From Coverage

The only relevant laws to interpret whether an individual is an employee or an employer are the federal labor laws applicable in Puerto Rico and the labor laws of the Commonwealth of Puerto Rico. Both expressly exempt partners from their coverage. Contrary to Petitioner's contention, several of the Commonwealth's labor laws expressly exclude partners from its definitions of covered employees.

Partners are specifically excluded from coverage of the Disability Benefits Act (SINOT) (See Puerto Rico Laws Ann. tit. 11, § 202) and The Employment Security Act (Puerto Rico Laws Ann. tit. 29, § 702 (1995)). Both use identical language to exclude employment services rendered by a *partner for the partnership of which he is a party*. (Emphasis supplied.)

While the Workmen's Accident Compensation Act does not specifically exclude proprietary partners, it expressly includes industrial (non capital) partners except where the partnership to which they belong has been executed through public deed or instrument signed by notary public. (See Puerto Rico Laws Ann. tit. 11, § 2 (1978)). Undoubtedly, this silence as to capital partners while including working partners, demonstrates the legislative intent of excluding owners of the employing entity.

Moreover, in interpreting the preceding Workmen's Compensation Law, the Supreme Court held that a partner is not an employee for purpose of workmen's compensation, distinguishing the cases dealing with a corporate stockholder or officer who provides a service to a corporation. *Colón v. Com. Indem. Obreros*, 34 P.R.R. 94 (1925).

CONCLUSION

In conclusion, Petitioner's arguments do not warrant review by this Court. None of the circuits has adopted an entity approach requiring a finding of employee status. Some have relied on a common law test of employment relationship while others use an economic realities test, or a combination of both. None of the circuits however, applies a *per se* rule such as proposed by Petitioner. Petitioner has misstated the Puerto Rico Partnership Law and the applicable jurisprudence thereunder. Accordingly, the Court should deny the granting of petitioners application.

Finally, in the absence of employee status, Petitioner's ardent arguments for the obliteration of the Glass Ceiling are insufficient to warrant review of her discrimination claims by the Court.

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